ORIGINAL

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1989

89-6679

JOHN EDWARD SWINDLER, PETITIONER
VS.
A. L. LOCKHART, DIRECTOR OF ARKANSAS DEPARTMENT OF CORRECTIONS, RESPONDENT

No

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SUPREME COURT, U.S.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now the petitioner, John Edward Swindler, by his attorney, Thurman Ragar, Jr., a member of the bar of this court, and moves the court for an order permitting the petitioner, John Edward Swindler, to proceed herein in forma pauperis and for his motion states:

1. The petitioner, John Edward Swindler, is a prisoner, incarcerated in the Arkansas Department of Corrections with a sentence of death and is without funds, to pay the costs herein.

2. The petitioner, John Edward Swindler, sought and was granted leave to proceed in forma pauperis by the United States District Court for the Eastern District of Arkansas and by the United States Court of Appeals for the Eighth Circuit.

WHEREFORE, the petitioner, John Edward Swindler, prays that an order granting the petitioner, John Edward Swindler, leave to proceed in forma pauperis, be granted and all other relief as to the court may be deemed proper and proper. BELOW COUNSEL WAS APPOINTED PURSUANT TO THE CRIMINAL JUSTICE ACT, 3006A.

THURMAN RAGAR, JR.
Attorney for Petitioner
P.O. Box 796
Van Buren, Arkansas 72956-0796
(501) 474 5994

Thurman Ragar, Jr.

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A. L. LOCKHART, DIRECTOR OF ARKANSAS DEPARTMENT OF CORRECTIONS, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT APPEALS FOR THE EIGHTH CIRCUIT

PETITION OF JOHN EDWARD SWINDLER FOR A WRIT OF CERTIORARI

THURMAN RAGAR, JR.
Attorney for Petitioner
P.O. Box 796
Van Buren, Arkansas 72956-0796
(501) 474 5994

QUESTIONS PRESENTED FOR REVIEW

1. Effective assistance of counsel?

A. Is constitutionally effective assistance of counsel rendered by trial counsel:

(1) when counsel presents no mitigation evidence, in the punishment phase of the petitioner's second capital murder trial even though counsel, because of his experience, was of the opinion that the sentence in the petitioner's second trial would be the same as in the first trial--- death;

(2) when, not withstanding his opinion of the jury's verdict, trial counsel made no investigation of the possibilities of mitigation evidence, even though the report of the mental examination by the State Hospital of the petitioner showed the petitioner to be an "antisocial personality".

B. Is effective assistance of counsel rendered when the petitioner's trial counsel fails to make an adequate record by failing to follow statutory procedures to obtain a change of venue when the certainty of that issued to be raised on appeal was apparent.

2. Was Ark. Code § 61-88-207 unconstitutionally applied to the petitioner in the granting of only one change of venue when prejudicial pretrial publicity was revealed during voir dire in violation of the petitioner's rights under the 6th and 14th Amendments.

3. Did the trial court use an unconstitutional standard of the opinion in permitted of jurors, in permitting veniremen who expressed an opinion that the petitioner was guilty of the charge to be seated as jurors?

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2. The order of the Court of Appeals for the Eighth Circuit dated December 19, 1990 is found in the Appendix at page 23

3. The opinion of the United States District Court for the Eastern District of Arkansas, not yet reported, is found in the Appendix at page 24.

4. The opinion of the Supreme Court of Arkansas overruling the petitioner's post appeal, post conviction petition, **Swindler v. State,** 272 Ark. 340, 617 SW2nd. 1, is found in the Appendix II.

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JURISDICTIONAL STATEMENT

1. (a.) The Court of Appeals for the Eighth Circuit rendered its decision in this case on September 26, 1989.

(b.)The petitioner's motion for rehearing was denied. November 27, 1989.

(c.) The mandate of the Court of Appeals was recalled on December 19, 1989, reinstating the stay of execution pending the filing of the a petition for a writ of certiorari with this court by and until January 26, 1990.

2. This court has jurisdiction pursuant to 28 U.S.C §1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment 6 to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense.

Amendment 14 § 1 to the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2254 (d)

In any proceeding instituted in Federal court by an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the application for the writ and the state or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State Court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair and adequate hearing in the State court proceeding;

(7) that the applicant was otherwise denied due process of law;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, after the Federal court on a consideration of such part of the record as a whole

concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs number (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph number (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

Art. 2 § 9 Constitution of Arkansas.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county in which the crime shall have been committed; provided that the venue may be changed to any other county of the judicial district in which the indictment is found; upon the application of the accused, in such manner as not is, or may be, prescribed by law;...

Ark Code § 5-4-605

Mitigating circumstances shall include but not limited to the following:

(1) The capital murder was committed while the defendant was under extreme mental or emotional disturbance;

(2) The capital murder was committed while the defendant was acting under unusual pressures or influences or under the domination of another person;

(3) The capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication or drug abuse;

(4) the youth of the defendant at the time of the commission of the capital murder.

(5) The capital murder was committed by another person and the defendant was an accomplice and his participation relatively minor;

(6) The defendant has no significant history of prior criminal activity.

Ark. Code § 16-33-305(b)

(b) The defendant hall be entitled to twelve (12) peremptory challenges in prosecutions for capital murder, to eight (8) premeptory challenges in prosecutions for all other felonies and to three (3) peremptory challenges in prosecutions for misdemeanors.

Ark. Code § 16-88-204

(a) The application of the defendant for an order or removal shall be by petition setting forth the facts on account of which the removal is requested. The truth of the allegations in the petition shall be supported by the affidavits of two (2) credible persons who are qualified electors, actual residents of the county, and not related to the defendant in any way.

(1) Reasonable notice of the application shall be given to the prosecuting attorney.

(2) The Court shall hear the application and, after considering the facts set forth in the petition and the affidavits accompanying it and any other affidavits or counter affidavits that may be filed and, after hearing any witnesses produced by either party, shall either grant or refuse the petition according to the truth of the facts alleged in it and established by the evidence.

(b) Every order for the removal of a criminal cause under the provisions of this subchapter shall state whether the order is made on the application of the party, or on facts within the knowledge of the court or judge making the order, and shall specify the cause of removal, and designate the county to which the cause is to be removed.

(c) The order, if made in term time, shall be entered on the record of the proceedings of the court. If made by judge in vacation, the order shall be in writing and be signed by the the judge and shall be filed by the clerk with the petition, if any, as a part of the record.

Ark. Code § 16-88-207

In no case shall a second removal of the same cause be allowed.

STATEMENT OF CASE

John Swindler, was convicted in the Circuit Court of Scott County, Arkansas for the Capital Felony Murder killing a Fort Smith, Arkansas policeman. The jury fixed Swindler's sentence at death.

Swindler had been previously tried in the Circuit Court of Sebastian County, Arkansas and convicted and sentenced to death. The first conviction was overturned by the Arkansas Supreme Court in the **Swindler v. State**, 264 Ark. 107 569 SW 2nd. 120 (1978) because the trial court had refused to grant Swindler's motion for a change of venue and three jurors had been improperly allowed to set on the jury.

There had been extensive media coverage of the murder of the police officer, Swindler's arrest, and Swindler's background which included his prison record and information on his being wanted by South Carolnia authorities for the wanton murder of two teenagers. Swindler was represented at both trials by two public defenders. Lead counsel was an experinced trail attorney with 50 to 60 jury trials.

The evidence was undisputed that the police officer was killed by Swindler.

Scott County is the county immediately south of Sebastian County. The County seat, Waldron, is about 45 miles south of Fort Smith. Scott County is a rural county of approximately 8500 inhabitants. There or no televisions stations or daily newspapers published in Scott county. The news media of Fort Smith is the primary news media of Scott county. Trial counsel undertook no investigation of the possible prejudice against Swindler in Scott County prior to the trail, for purpose of filing of a motion for a change of venue. Trial counsel had talked with the sheriff of Scott County and the Clerk of the Court and in their opinion there was strong unfavorable opinion of Swindler, about the same as in Sebastian County.

The voir dire exmination of the jury lasted five days. Swindler's lawyers moved on six occasions for a mistrial to move the trial to another county because of prejudicial pretrial publicity and jury prejudice, the last motion being made after the jury was chosen based upon the voir dire. Swindler exhausted his peremptory challenges. 120 veniremen were examined in the selection of the twelve jurors and one alternate. 79 veniremen were excused for cause. Of these 79, four were excused because of opposition to the death penalty.

Three veniremen had been challanged for cause by Swindler, but were seated anyway. All three stated that he felt Swindler guilty. One stated that he could not assure the court that is prior opinion would not influence his deliberations as a juror. One stated as a result of information received from the media and the result of the first trial, he believed Swindler guilty, but he would try to follow the judges's instructions, but he could not errase something from his mind. One stated that his opinion would be that it would have to turn out like the first trial.

During the guilt phase of the trial Swindler presented no evidence or testimony in mitigation of the death sentenece.

Swindler appealed again to the Supreme Court of Arkansas. The Arkansas Supreme Court affirmed the judgment and sentence of the second trial. Swindler exhaused his state court post-conviction remedies and filed a petition for a writ of habeas corpus in the District Court for the Eastern District of Arkansas pursuant to 28 U.S.C §§ 2242 and 2254. In his petition he alledged six grounds for relief. Three of those grounds are brought forth in this petition.

At the hearing on Swindler's habeas coprus petition Swindler's trial attorney, testified that he was familar

with the ruling in **Irwin v. Dowd,** and the Arkansas laws concering change of venue, but he under took no steps to prepare a motion for a change of venue. Thus there was no record of any prejudicical pretrial publicity.

He had a pretty good idea of the nature of the state's case and the evidence which would be presented and as experenced trial attorney felt that with that evidence, the outcome of the second trial was very likely to be the same as the first trial. Eventhough, he hoped for a different result in the penalty phase of the trial, he realized that there was a high likelihood that the death penatly would be imposed again by the jury. Swindler had had a pyschiatric examation at the State Hospital prior to the first trial, he did not undertake any investigation of any circumstances which could be offered in mitigation to the agrivating circumstances the state would offer. The State Hospital report indicated that Swindler was a "antisoical personality".

Swindler had told his lawyer about mental problems he (Swindler) had had since his youth. Swindler testifed that he been in trouble with the law since he was about 14 years of age. He had spent most of his life since then in one penal institution or another. During these incarcerations he was subjected to numerous psychological and psychiatric examations by the authorities who held him. One of the reason a for a light sentence when he was sentenced by a South Carolina Court was the evaluation at the State Hospital in South Carolina. He had brought these evaluations to the attention of his lawyer. He testifed that in 1951 or 1952 when was a child he fell off a bridge and was knocked unconsious for two days.

The District Court denied the Swindler's petition for a Writ of Habeas Corpus, and that order denyning the writ was affirmed by the Court of Appeals for the Eighth Circuit.

ARGUMENT

1. Effective assistance of counsel?

Petitioner does not contend that his trial counsel was incompetent. Petitioner does contend they were constitutionally ineffective. He has been prejudiced by the ineffective assistance of counsel. Competent counsel may on occasion render constitutionally ineffective assistance of counsel. It happened in Swindler's trial in Scott County Arkansas.

A. Is constitutionally effective assistance of counsel rendered by trial counsel:

(1) when counsel presents no mitigation evidence, in the punishment phase of the petitioner's second capital murder trial even though counsel, because of his experience, was of the opinion that the sentence in the petitioner's second trial would be the same as in the first trial--- death;

(2) when, not withstanding his opinion of the jury's verdict, trial counsel made no investigation of the possibilities of mitigation evidence, even though the report of the mental examination by the State Hospital of the petitioner showed the petitioner to be an "antisocial personality".

No evidence was presented by Swindler in the penalty phase of his capital murder trial. Trial Counsel admitted at the habeas corpus hearing of this case that he had a pretty good idea of the results of the trial would be the same as the first trial. A guilty verdict and a death sentence.

The lead trial counsel was an experienced attorney who handled during the six years he had been a public defender 50 or 60 jury trials, including Swindler's first trial which had been reversed by the Supreme Court of Arkansas. Counsel knew the evidence the State would produce. It would not be greatly different that the evidence produced in the first trail. The reversal in the Supreme Court did not result in the exclusion of any evidence which had been presented in the first trial.

Given the State's evidence, the primary goal in his defense of Swindler would be to avoid the death penalty. Trial counsel made no investigation whatsoever to prepare for the penalty phase of the trial.

Plenty of avenues presented themselves to mitigate the death sentence. Swindler testified at the habeas corpus hearing that he had had during his youth a serious head injury. He had been examined by numerous professionals in the mental health field during his years of incarceration, but trial counsel made no attempt to obtain those records, to obtain any information about his client.

Swindler had been examined by the Arkansas State Hospital shortly after his arrest. That report was filed with the trial court. The report contained information that Swindler had "personality defects" and was an "antisocial personality". Swindler's lawyers did not communicate with any of the State Hospital professionals who had examined Swindler to explore the possibilities that Swindler might have some mental or emotional disturbance or defect which could have been evidence of mitigation.

The report of the State Hospital focused on Swindler's mental condition at the time of his arrest to determine if he were competent to stand trial and to determine if he was suffering from insanity which would be a defense to the charge. The psychologial evidence offered as defense to charge and offered in mitigation to death penalty are not the same.

In the penalty phase of the trial, evidence which may be offered in mitigation includes any mental disease or defect and intoxication, Ark. Code § 5-4-605(3).

Swindler testified that he had drunk a six pack of beer and some vodka during the afternoon before he arrived in Fort Smith. Intoxication can be a mitigating circumstance.

The District Court's statement denoting Swindler's trial

counsel actions as "trial strategy", accepted by the Eighth Circuit is not supported by the record.

Trial strategy is developed after the lawyer has familiarized himself with the case and carefully studied the facts and applicable law. In a capital case this will often involve two different preparations and strategies, for the issues and burdens of proof are not the same. Nothing was done in preparation for the penalty phase which could have been offered in mitigation to achieve the primary goal of his defense of Swindler, to save his life.

Lead trial counsel had lived in Western Arkansas for several years. His office was in Fort Smith. No investigation was made of the attitudes of the people of Scott County towards Swindler, except some conversations with the Sheriff and the court clerk shortly before the trial which only confirmed his gut feeling that the attitudes of the citizens of Scott County were no different than attitudes of the citizens Sebastian County.

No motion for change of venue was filed to have the trial moved further from Fort Smith until after the voir dire of the jury began. That motion was a oral motion not in compliance with the statue.

Ark. Code § 16-88-204 sets forth the procedure to obtain a change of venue. First the defendant makes application by a petition for a change of venue, setting forth the facts to support the removal. With the petition the defendant must attach at least two affidavits of creditable persons, registered to vote, not related to the defendant and actual residents of the county. Second, the defendant must give "reasonable notice" to the prosecution. The court then has a hearing and the state can produce counter affidavits and either party can call witnesses. The proceedings are part of the record. Trial counsel was familiar with the procedure. It was on the

record he made by in the first trial that the Arkansas Supreme Court found prejudicial pretrial publicity and ordered a new trial.

With over a hundred citizens setting in the courtroom and halls of the courthouse awaiting the voir dire, it was a little late to move for a change of venue. One can imagine easily the reaction of the trial court to such a motion. The effectiveness of counsel does not begin when he walks into the courtroom. There must be preparation beforehand. A record must be made for an appeal, should one be needed.

Counsel was familiar with the law set forth in **Irvin v. Dowd**, 366 U.S. 717 as to what must be shown to show prejudice.

The District Court found that there was not ineffective assistance of counsel in failing to follow the correct procedure to obtain a change of venue, because the trial court addressed the motions and considered the motions on the merits and found no basis for a change of venue. The Supreme Court of Arkansas in **Swindler v. State**, 267 Ark. 418, 592 SW2nd. 91 held otherwise. The Arkansas Supreme Court stated:

> [N]o evidence at all was offered of pretrial publicity. No affidavits or testimony, showing pretrial publicity or ill feelings in the community as result of the killing was offered...
>
> Our law provides affidavits or sworn testimony must be offered in support of a motion for a change of venue.
>
> The only evidence we have of prejudicial pretrial publicity is the voir dire testimony of the prospective jurors as 120 jurors were examined, at p 94.

The District Court's finding, accepted by the Eighth Circuit is a <u>non sequitur</u>. The fallacy in the District Court's finding is that the issue is: the effectiveness of legal representation of the defense counsel; not whether the motion for change of venue should have been granted. Neither the District Court nor the Court of Appeals court address the issue. The issue is the failure to made a record. The

Arkansas Supreme Court did not even get to the question of whether a change of venue should have been granted, because none had been requested in the manner provided in the statutes. The finding of the Supreme Court of Arkansas, that there was no record is entitled pursuant to 28 U.S.C. § 2554 (d) to a presumption of correctness.

In **Strickland v. Washington**, 466 U.S. 668 (1968) the court sets forth the two rules which must be met before a conviction or a sentence of death can be set aside because of ineffective counsel, those rules are:

> First the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.
>
> Second the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose results are reliable. at p 2064.

The Supreme Court did not state and has not stated that "ineffective" counsel which fails to meet the standards required by the Sixth Amendment is synonymous "incompetent" counsel. There are times when competent counsel can render legal services to a defendant in a criminal trial which are ineffective and fail to meet the standards required by the Sixth Amendment for effective counsel. It happened in Scott County Circuit Court in this case.

Strickland does not set forth a check list of steps taken by counsel to determine whether or not constitutionally effective counsel has been rendered. Such guidelines would, the court felt, be inappropriate.

Strickland involved the an allegation of ineffective assistance of counsel during the sentencing stage of a capital murder trial, much like the procedure used in Arkansas. The court stated:

> A capital sentencing proceeding like the one involved in this case, however, is sufficiently like

> a trial in its adversarial format and in the existence of standards for decision... that counsel' s role in the proceeding is comparable to counsel's role at trial--to ensure that the adversarial testing process works to produce a just result under standards governing decision. at p 2064

While in **Strickland**, the court did not set forth set of rules to assess effectiveness of counsel, the court did in **United States v. Cronic**, 104 S. Ct. 2039, decided the same day as **Strickland** set forth some minimum standards for effective counsel. The court stated:

> [I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process presumptively unreliable.

The court in footnote no. 26 in **Cronic** cites an Eighth Circuit case, **McQueen v. Swenson**, 498 F2nd. 207, (1974) in which the Court approved the manner in which specific errors were shown which undermined the reliability of the finding of guilt.

In **McQueen** the Eighth Circuit used the ABA Project of Standards for Criminal Justice "Standards Relating to the Prosecution Function and the Defense Function" as a starting point in assessing the effectiveness of counsel. 4.1 of those standards state:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to fact relevant to guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exist regardless of the accused 's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty.

Swindler's counsel's conduct must be shown to be so deficient that there would be a reasonable probability that the outcome of the trial would have different had his lawyers not committed the default, **Strickland v. Washington**, supra The only outcome at issue here is the sentence. Death or not death.

Here as in **Cronic**, supra, there was a complete failure to subject the prosecution case during the penalty phase of the trail to any meaningful adversarial testing. There is therefore a presumption that Swindler was rendered constitutionally ineffective assistance of counsel, **Cronic**, supra.

When a jury is instructed, as they are, when they are asked by the state to return a sentence of death, that they must find "The aggravating circumstances outweight beyond a reasonable doubt any mitigating circumstances. (If you do not unanimously agree ... sentence the defendant to life imprisonment without parole."Arkansas Model Instructions, Criminal 1509 (b). The issue of how much error has to be committed before reasonable doubt is raised in the mind of one juror, so that there is a reasonable probability, that the sentence would not be death, is elusive.

2. Was Ark. Code § 16-88-207 unconstitutionally applied to the petitioner in the granting of only one change of venue when prejudicial pretrial publicity was revealed during the voir dire in violation of the petitioner's rights under the 6th and 14th amendments?

Ark Code § 16-88-207 states:

> In no case shall a second removal of the same cause be allowed.

The above quoted section must be read in conjunction with Section 10 of Article II of the Constitution of the State of Arkansas which provides ..."provided that the venue may be changed to any county of the judicial district in which the indictment is found...".

The Sixth Amendment is the starting point in the in-

quiry as to whether the defendant has had a fair trial. There is a the two prong inquiry into prejudice caused by pretrial publicity. The first is the nature and extent of the pretrial publicity. The second is the effect of the pretrial publicity on the venire panel from which the jury is selected. The Sixth Amendment does not require a jury composed of jurors ignorant of the facts. It requires a jury composed fair jurors.

A little more than one year before the trial in Scott County, Arkansas, Swindler had been tried in Sebastian County, Arkansas. His conviction was overturned by the Arkansas Supreme Court because of the failu e of the trial court to grant a change of venue, because of the prejudicial pretrial publicity. In the first trial 62 prospective jurors were questioned. 23 were excused for cause. The responses of the Sebastian County veniremen reported in first case are almost identical to the Scott County veniremen in the record in this case. If the case had been retired in Sebastian County and the responses from jury the same as in this record, would there be any doubt that a change of venue would have been required?

The Supreme Court stated in **Patton v. Yount**, 467 U.S. 1025 at 1035, "It is not unusual that one's recollection of the fact that notorious crime was committed lingers long after the feelings of revulsion that create prejudice have passed". While the court did not state the converse, logic does: that the prejudice created by the revulsion to a notorious crime can linger long. The operative term is prejudice. Prejudice once created in the hearts and minds of man lingers long, even after the event giving rise to that prejudice has been forgotten. The history of the republic, unfortunately, is evidence that prejudice can even stretch through generations.

Arkansas Code § 16-88-207 was enacted in 1873. 45 miles, the distance between Fort Smith and Waldron, was a great distance to travel then, taking perhaps two days. Communities were more insular. The occurrences in one county were not news in the next. Today 45 miles is meaningless in terms of prejudicial pretrial publicity. To move a trial from a county in which the Supreme Court of the Arkansas had found that it was impossible for Swindler to obtain a fair trial due to the prejudicial pretrial publicity, to an adjacent county the county seat of which was only 45 miles from the site of the first trial, does not serve the purpose of the granting of the change of venue. In reality Scott County is Sebastian County when the attitudes of the veniremen in this case are examined. To hold that line drawn on a map somehow separates the prejudiced veniremen from he unprejudiced veniremen is to engage in sophistry and to ignore reality.

Over three times as many jurors were excused for cause in Scott County than in Sebastian County.

The voir dire in the Scott County Circuit Court at Waldron lasted five days. 120 veniremen were examined (almost twice the number examined in Sebastian County); 79 were excused for cause.

Illustrative, is the voir dire of Venireman Thomas Bricksey whom the court refused to excuse for cause but did not serve because Swindler used a peremptory challenge. Venireman Bricksey was a life long resident of Scott County (he was 40 years old) he had read the news paper and saw the television news casts concerning the murder of Officer Basnett and remembered the first trial. He had discussed the the case with others and those persons had expressed opinions about the case. In response to the question, "Could you tell me what those opinions were? Did they think the defendant was guilty?"

Bricksey replied, "I am afraid it was almost unanimous."

Mr. Settle then asked, "Did you ever hear anybody state they thought he was not guilty?"

Bricksey: "No, sir."

The District Court and the Court of Appeals emphasized the length of time between the first trial and the second. But they ignored the first prong of the inquiry: the nature and extent of the pretrial publicity. Swindler was cop killer. He was felon on parole from federal prison, with a long line of convictions. He was accused of the brutal murder ot two South Carolina youths. He had been convicted once of this crime by a jury of 12 persons from just up the road. The nature of the crime and identity of the defendant insures that the mere passage of a relatively short period of time will not erase the prejudice against a cop killing federal parolee.

The record reflects a panel of citizens which is be a cross section of the community. An expensive poll conducted for the purpose of showing pretrial publicity would have revealed no more. The District Court 's finding: "The twoyear interim in Swindler's case suggest that the nature and extent of the publicity must surely have diminished along with the heat and hostility." is not supported by the record. The veniremen of Scott County were as prejudiced as those in Sebastian County.

3. Did the trial court use an unconstitutional standard of the opinion in permitted of jurors, in permitting veniremen who expressed an opinion that the petitioner was guilty of the charge to be seated as jurors?

Pursuant to Ark Code § 16-33-305 Swindler had twelve peremptory challenges. He excused his peremptory challenges when he excused Venireman John Montgomery after eleven jurors

had been seated. Of the eleven seated, three veniremen had been challenged for cause, but the seated over the objection of Swindler. They were Jurors, Henry Sunderman, Thurman Jones and Milton Staggs

Juror Sunderman stated that he had an opinion which he had stated to other persons that Swindler was guilty. He could not assure the court that his prior opinion would not influence his deliberations as a juror, but that he would weigh the evidence presented in the courtroom and not from the media.

Juror Jones stated that from the information he had received from the media and based upon the results of the first trial his opinion was that Swindler was guilty. He stated that he would follow the judge's instructions to the best of his ability but he could not erase something from his mind.

Juror Staggs stated that based upon he had heard he had a little bit of an opinion which was the that the trial would have to come out like the first trial. He stated that he would not have difficulty in setting aside his opinion.

In **Patton v. Yount**, 104 U.S. 1025, the court stated:

> The relevant question is not whether the community remembered the case, but whether the jurors at Yount's trial had such fixed opinion that they could not judge impartially the guilt of the defendant. at p.1035.

It is apparent from the voir dire of the three jurors seated over the objections of Swindler, that the jurors had a fixed opinion of the petitioner's guilt and should have been excused for cause.

The District Court acknowledged that the three jurors in question had tentative opinions. Of course. That tentative opinion was that Swindler was guilty. The record does not support the District Court's assertion that the three jurors responses during the voir dire that they could judge the defendant solely on the evidence at the trial.

The responses of the jurors indicate that they would take those prejudices into the jury box.

The finding of the Scott County Circuit Court that the jurors were fit is based upon an unconstitutional standard, to wit: that a opinion of a venireman that the defendant is guilty may be held so long as venireman thinks he might be able to set aside that opinion. The constitutionality of this standard is a question of law and the District Court's deference to the trial court's finding pursuant to 28 U.S.C. § 2554(d) is error. The trail court's standard does not meet the standard set forth in **Adams v. Texas**, 488 U.S. 38, a venireman may not be seated as a juror when the venireman 's opinion...

> would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.

CONCLUSION

For the reasons set forth above, petitioner, John Edward Swindler, prays that this court grant to him a writ of certiorari directing the Court of Appeals for the Eighth Circuit to certify the record of this case to this court so that this court can rule on the issues raised herein, reverse the decision of the Court of Appeals for the Eighth Circuit and reverse the denial of the District Court petition for a Writ of Habeas Corpus and order the District Court to grant the Writ of Habeas Corpus and direct the State of Arkansas to retry the sentencing portion of the trial or reduce to Swindler's sentence to life in prison without parole.

THURMAN RAGAR, JR.
Attorney for Petitioner
P.O. Box 796
Van Buren, Arkansas 72956-0796
(501) 474-5994

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 88-2387

John Edward Swindler,

Appellant,

v.

A. L. Lockhart, Commissioner of the Arkansas Dept. of Correction,

Appellee.

Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: April 12, 1989

Filed: September 26, 1989

Before BOWMAN, Circuit Judge, HENLEY, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

BOWMAN, Circuit Judge.

John Edward Swindler appeals from the District Court's[1] denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. We affirm.

On September 24, 1976, Swindler, in flight from South Carolina where he was wanted for the murders of two teenagers, stopped off at a service station in Fort Smith, Arkansas apparently to ask directions to Kansas City. At the service station, Swindler was approached by Randy Basnett, a Fort Smith police officer. Swindler shot and killed Officer Basnett. Before he died, Basnett was able to fire five or six times through the car door injuring Swindler. Swindler was caught shortly thereafter.

Swindler was convicted of capital felony murder for the shooting death of Officer Basnett, and was sentenced to death. The Supreme Court of Arkansas overturned that conviction because the trial court erroneously refused to grant a change of venue from Sebastian County, the situs of the killing, and because the trial court failed to excuse three jurors. Swindler v. State, 264 Ark. 107, 569 S.W.2d 120 (1978).

Swindler was retried in Scott County, Arkansas, which adjoins Sebastian County, and convicted of capital felony murder for the second time and sentenced to death. The second conviction and death sentence were affirmed by the Supreme Court of Arkansas. Swindler v. State, 267 Ark. 418, 592 S.W.2d 91 (1979), cert. denied, 449 U.S. 1057 (1980). Subsequently, Swindler sought post-conviction relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure. This relief also was denied by the Supreme Court of Arkansas. Swindler v. State, 272 Ark. 340, 617 S.W.2d 1 (1981), cert. denied, 454 U.S. 933 (1981).

State post-conviction remedies thus exhausted, Swindler filed a writ of habeas corpus in the District Court pursuant to 28 U.S.C. §§ 2242 and 2254 alleging six grounds for relief: (1) a venireman was erroneously excluded after he voiced only general objections to the death penalty; (2) Swindler was improperly denied a second change of venue; (3) jurors biased against Swindler were seated against the objections of defense counsel; (4) Swindler was denied a continuance at the penalty phase of his

[1] The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas.

trial to enable him to present a witness on his behalf; (5) an "aggravating circumstance" was erroneously considered by the jury during the penalty phase of his trial; and (6) Swindler was denied effective assistance of counsel at trial.

After a hearing, the District Court denied Swindler's petition. 693 F. Supp. 760 (E.D. Ark. (1988)). On appeal, Swindler repeats his six grounds for relief. Finding the claims meritless, we affirm the judgment of the District Court.

I.

Swindler contends that a member of the venire, Mr. Carmack, was excluded improperly after expressing only a general objection to the death penalty. We disagree.

In Wainwright v. Witt, 469 U.S. 412 (1985), the Supreme Court clarified the standard for determining when a prospective juror may be excluded for cause because of his view on capital punishment. Witt held that the proper test is whether the juror's views on capital punishment would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Id. at 424 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). The Court rejected the standard, taken from a footnote in Witherspoon v. Illinois, 391 U.S. 510, 522-3 (1969) n.21, that in order to exclude a juror for cause it must be "unmistakably clear" that the juror would "automatically" vote against the imposition of the death penalty.[2] Witt, 469 U.S. at 424-25. In this regard,

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[2]The Supreme Court stated:

> We note that, in addition to dispensing with Witherspoon's reference to "automatic" decisionmaking, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is

this Circuit recently stated:

> We perceive the fundamental difference between Witherspoon and the Adams-Witt rule to be one of lessened degree as to the burden of proof. In order to exclude a juror under Witt the State no longer must show that it is unmistakably clear that the juror's opposition to capital punishment would automatically cause exclusion.

Hulsey v. Sargent, 865 F.2d 954, 956 (8th Cir. 1989) (footnote omitted).

Witt also clarified the degree of deference a federal habeas court must give to a state trial judge's determination that a potential juror's opposition to the death penalty is cause for exclusion. The Court stated:

> Last term, in Patton [v. Yount, 467 U.S. 1025 (1984)], we held that a trial judge's finding that a particular venireman was not biased and therefore was properly seated was a finding of fact subject to §2254(d). We noted that the question whether a venireman is biased has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the venireman's state of mind. We also noted that such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province. Such determinations were entitled to deference even on direct review; "[t]he respect paid such findings in a habeas proceeding certainly should be no less." Id., at 1038.
>
> Patton's holding applies equally well to a trial court's determination that a prospective capital sentencing juror was properly excluded for cause.

> because determinations of jurors bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear[.]"

Witt, 469 U.S. at 424-25.

* * *

> Once it is recognized that excluding prospective capital sentencing jurors because of their opposition to capital punishment is no different from excluding jurors for innumerable other reasons which result in bias, Patton must control. The trial judge is of course applying some kind of legal standard to what he sees and hears, but his predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record. These are the "factual issues" that are subject to §2254(d).

Witt, 469 U.S. at 428-29 (footnotes omitted). It follows from Patton and Witt that our task in this section 2254 case is to determine whether fair support exists in the record as a whole for the trial court's determination that Carmack's view on capital punishment would "prevent or substantially impair the performance of his duties as a juror." See Darden v. Wainwright, 477 U.S. 168, 176 (1986); Hulsey, 865 F.2d at 959.

The voir dire of Carmack was as follows:

Q. Let me ask you this. Do you think the death penalty is proper punishment for some crimes?

A. I wouldn't think so.

Q. Do you believe in the death penalty?

A. Not so much.

Q. Do you understand that under the law of Arkansas that it is the jury that finds whether a person is guilty or not guilty, and then if the jury finds the defendant guilty then the jury actually sets the punishment, that is not done by the Judge. Now, if you were on this jury, and you listened to all the evidence, could you, under any circumstances, vote for the death penalty?

A. I wouldn't want to.

Q. I understand you might not want to, but you know it is the law of Arkansas, and if you listened to the evidence and you found that under our law this was a proper case for the death penalty, then could you follow Arkansas law, or would you stick to your own personal feelings?

A. Well, now I would stick to what I believe in.

Q. So are you telling me that no matter what the facts are, or what the law is, that you would not vote for the death penalty?

A. No, I don't think I would.

Q. Okay, now you say you don't think you would. Can you tell me for sure that you would or would not?

A. Well, I wouldn't then, I will put it that way.

Q. No matter what the facts were, or what the law was, you would not vote for the death penalty?

A. No, I don't believe I could, and then have a clear conscience.

MR. KARR: I submit him for cause, Your Honor.

THE COURT: All right, Mr. Carmack, apparently what you are telling Mr. Karr is that you do oppose or have conscientious objections to the death penalty?

A: Right.

THE COURT: Now, what he has asked you is, and I want to ask you, too, to be sure that I understand. Is that feeling that you have or your belief so fixed and strong that regardless of what the facts might be, regardless of how bad they might be, or how aggravating they might be, in any case, that under no circumstances could you consider imposing the death penalty?

A. I wouldn't.

THE COURT: In any case?

A. I don't believe I would.

DEFENSE ATTORNEY: I have no questions, your Honor.

THE COURT: All right, he will be excused for cause.

(Tr. 1446-48). We conclude that the preceding voir dire provides ample support for the trial court's determination that Carmack should be excused because of his opposition to the death penalty. Therefore, we affirm the District Court's ruling that the trial court properly excluded this juror.[3] 693 F. Supp. at 763.

II.

Swindler next argues that the state trial court erred in denying his motion for a second change of venue. Swindler argues that he was entitled to a change of venue because of adverse

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[3]Swindler's claim that Carmack expressed only general objections to the death penalty because he used words such as "believe" and "think" is unpersuasive when one reads the voir dire in its entirety. See Witt, 469 U.S. at 424-26, where the Supreme Court held that a potential juror's removal for cause was proper on the basis of the following voir dire:

> "[Q. Prosecutor:] Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?
> "[A. Colby:] I am afraid personally but not--
> "[Q]: Speak up, please.
> "[A]: I am afraid of being a little personal, but definitely not religious.
> "[Q]: Now, would that interfere with you sitting as a juror in this case?
> "[A]: I am afraid it would.
> "[Q]: You are afraid it would?
> "[A]: Yes, Sir.
> "[Q]: Would it interfere with judging the guilt or innocence of the Defendant in this case?
> "[A]: I think so.
> "[Q]: You think it would.
> "[A]: I think it would.
> "[Q]: Your honor, I would move for cause at this point.
> THE COURT: All right. Step down." Tr. 266-67.

469 U.S. at 415-16.

pretrial publicity surrounding his retrial. Swindler further contends that he was denied a second change of venue because an Arkansas statute, Ark. Code Ann. § 16-88-207 (1987), which purportedly limits a criminal defendant to one change of venue, was unconstitutionally applied. We disagree.

After Swindler's first conviction was reversed by the Arkansas Supreme Court because the trial court failed to grant a change of venue, Swindler's trial was transferred to Scott County, which is adjacent to Sebastian County. Waldron, the County seat, is about 45 miles south of Fort Smith, the situs of the crime.

Swindler requested a change of venue at the close of each day of voir dire on the ground that the voir dire established that an impartial jury could not be seated. Although the trial judge expressed reservations as to his authority to grant the motion because of the Arkansas venue statute, he did however express a willingness to consider the constitutional implications of the statute if necessary.[4] After the jury had been selected,

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[4]After the second day of voir dire, Swindler moved for a change of venue. The trial judge denied the motion, stating:

> Also, as you have correctly pointed out, under the Arkansas law a defendant is only entitled to one change of venue, and the court feels that by the news media, and the advances that have been made, and the television, that perhaps there needs to be some changes perhaps made in the law.
>
> * * *
>
> I do want to proceed again tomorrow and see what progress, if any, can be made in the selection of the jury, then if the court is convinced that a jury cannot be obtained here, that jurors here do not have opinions or would be qualified to serve, then the court then would face the legal matter as to whether or not the rights you assert under the United States Constitution

Swindler moved again for a change of venue. The trial court denied the motion, again noting the Arkansas statute, but also denying it on the ground that the jury was impartial. (Tr. 1559-60). Thus, the Arkansas statute aside, the trial court based its denial of a second change of venue on the fact that Swindler had not established prejudice resulting from pretrial publicity.

In Simmons v. Lockhart, we held that although the state court misinterpreted Arkansas law on change of venue, there was not reversible error because the state court also based its ruling on its finding that the jury was impartial. 814 F.2d 504, 507-08; see also Perry v. Lockhart, 871 F.2d 1384, 1390 (8th Cir. 1989). The state court's determination that the jury was not prejudiced by the pretrial publicity and thus impartial is entitled to deference and can be overturned only for "manifest error." Yount, 467 U.S. at 1031 (quoting Irwin v. Dodd, 366 U.S. 717, 723 (1961)). We must give the state court's findings of fact a "presumption of correctness," and may not set them aside unless they are not fairly supported by the record as a whole. 28 U.S.C. § 2254(d)(1)-(8); see Simmons, 814 F.2d at 508. After a careful review of the record, we agree with the District Court that the trial court did not err in denying a second motion for change of venue. 693 F. Supp. at 763-66.

The only evidence regarding pretrial publicity in this case is found in the transcript of the voir dire. The voir dire lasted five days and covers nearly 900 pages of transcript, the larger part of which relates to the extent of the pretrial publicity and the effect it had on the veniremen. One hundred and twenty veniremen were examined and seventy-nine were excused for cause, although not all of those were excused on account of

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are such that it could be done contrary to the provisions of law.

(Tr. 1074-75).

pretrial publicity.[5] Although the voir dire reflects that there was a great deal of publicity in this case, the record of the voir dire does not reveal "such hostility towards [Swindler] by the jurors who served in his trial as to suggest a partiality that could not be laid aside." Murphy v. Florida, 421 U.S. 794, 800 (1975).

Swindler points to the fact that ninety-eight out of the 120 veniremen had some knowledge of the case. However, the fact that a large number of veniremen have heard of the case is not dispositive. As we said in Simmons: "[T]he fact that a venire panel is well informed on reported news is not by itself prejudicial. The accused is not entitled to an ignorant jury, just a fair one." Simmons, 814 F.2d at 510 (all but one of the fifty-six veniremen had heard of the case); see also United States v. Bliss, 735 F.2d 294, 298 (1984) (virtually all veniremen had some knowledge of the case). The question is whether "the pretrial publicity was so intensive and extensive or the examination of the entire panel revealed such prejudice that a court could not believe the answers of the jurors" regarding impartiality. Beck v. Washington, 369 U.S. 541, 557 (1962). We agree with the District Court that an examination of the voir dire "do[es] not necessarily evince a wave of public passion against this particular defendant." 693 F. Supp. at 764.

Besides our review of the voir dire, other factors lend support to the trial judge's determination that an impartial jury

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[5]Of the veniremen excused for cause, four were excused because of their opposition to the death penalty. Others were excused because of an inability to accept philosophically the legal concepts of "presumption of innocence" and "burden of proof." See, e.g., Veniremen #4 May (no pretrial publicity exposure, but could not accept presumption of innocence) (Tr. 725); Venireman #14, Stinson (excused because he would require defendant to offer evidence of innocence) (Tr. 828).

could be impaneled in Scott County. First, Swindler's second trial was conducted over two years after the commission of the crime, and over thirteen months after the first trial. The Supreme Court in Yount stated: "[I]t is clear that the passage of time between a first and a second trial can be a highly relevant fact." 467 U.S. at 1035. This is especially so when, as here, most of the publicity surrounding the crime occurred before and during the first trial. See, e.g., Venireman #53, Roderick (heard news accounts about first trial but nothing since) (Tr. 1104); Venireman #57, Rhyne (only knowledge came from media accounts of the murder at the time it occurred) (Tr. 1127).

In Simmons, in upholding a trial court's refusal to grant a change of venue, we indicated that the lapse of seven months was a relevant factor minimizing the effect of pretrial publicity. "Seven months is not long enough to allow complete forgetfulness of such a major event as this, but it may be long enough to allow the initial heat and hostility to dissipate, particularly when the local press had not kept the story in the forefront of public attention." 814 F.2d at 510; see also, Perry, 871 F.2d at 1390 (the fact that ten months had elapsed between the crime and the trial was a factor minimizing the effect of pretrial publicity).

A second factor minimizing the effect of pretrial publicity is that Swindler was tried over forty-five miles from the situs of the murder. In Simmons and Perry, we upheld trial court decisions not to move trials involving highly publicized murders from a county only five miles from the situs of the murders. Simmons, 814 F.2d at 506; Perry, 871 F.2d at 1389.

These factors combined with our review of the voir dire lead us to conclude that the trial court did not commit manifest error in denying Swindler's change of venue motion. To the contrary, we are satisfied that the painstakingly thorough voir dire assured that a fair and impartial jury was impaneled.

III.

Swindler's next argument for reversal concerns the failure of the trial court to excuse for cause three impaneled jurors who, he contends, exhibited fixed opinions as to his guilt.

In Yount, the Supreme Court held that the question of whether a particular juror "could set aside any opinion he held and decide the case on the evidence" is a question of "historical fact" to be determined by the state trial court. 467 U.S. at 1036. Therefore, a habeas court must afford this determination the presumption of correctness due a state court's factual findings under 28 U.S.C. § 2254(d). Id. at 1036-38; Simmons, 814 F.2d at 512. The question, then, for this court is "whether there is fair support in the record for the state courts' conclusion that the jurors here would be impartial." Yount, 467 U.S. at 1038.

Swindler challenges the seating of jurors Sunderman, Staggs, and Jones.[6] The District Court reviewed the record and determined that the trial court's decision not to excuse these jurors was fairly supported by the record. 693 F. Supp. at 766. Our own independent examination of the voir dire reveals ample support for the trial court's findings of impartiality.

During the voir dire, juror Sunderman stated that he had heard and read about the shooting and Swindler's first trial. Although he stated that he had formed an opinion as to Swindler's guilt after the first trial, he also made it clear that he could

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[6]Swindler challenged each of these jurors after extensive voir dire. After the trial court refused to remove the jurors for cause, Swindler did not strike any of them with an available peremptory and announced them "good" for the defense.

lay aside this opinion and impartially decide the case. See Tr. 972 (presently doesn't have an opinion as to how the case should be decided); Tr. 973 ("I would make my decision based upon the facts."); Tr. 978-9 ("I did not hear all of the evidence [at the first trial] and based on what I did hear at that particular time I had an opinion at that time; at this time I would base my opinion on the evidence that was presented."); Tr. 979-80 ("Well, as I said before, I had my opinion at that time, and I feel like if I sit on any jury it would be my duty to make my decision at that time based on the facts that were presented to me, not what had been presented somewhere else."); Tr. 982 ("If I were sitting on the jury I would weigh the evidence that was presented to me in the courtroom, and not what had been carried on TV or in the newspaper.").

Juror Staggs also stated that he had heard about the shooting and first trial. (Tr. 1231-32). Although the questioning at voir dire produced several ambiguous responses requiring, at times, the court's interjection for clarification (Tr. 1222, 1228-30), the record as a whole clearly supports the trial court's determination that Staggs was impartial.[7]

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[7]Illustrative of Staggs's ability to lay aside any opinion he might have had is this exchange with defense counsel after Staggs indicated he had formed an opinion as to Swindler's guilt after the first trial:

> Q. Do you have that opinion at this time?
> A. Yes, I guess you would say, to an extent. Not that I couldn't change it if it was different, but I still believe, you know, you would have to have some confidence in the people.
> Q. Is that a fixed opinion, you feel you would have difficulty getting rid of that opinion?
> A. No, I can accept facts.
> * * *
> Q. I am asking you, would you require something from the defendant's side of the case before you would change the opinion that you have?
> A. No. If I was on the jury I could listen, you know, to the trial; and if there was a difference, I wouldn't pay any attention to my opinion because if I listen to that I will listen to the facts that are brought out.
> * * *
> Q. You would not compare the State's evidence, or whatever the evidence might be with what had been reported?
> A. I would only want to hear what went on at the present.
> Q. Now, if you felt that the opinion was making it difficult for you while you were deliberating on the case, after the case was presented to you, and you felt you were having difficulties getting rid of your opinion, or your opinion was conflicting with what the evidence had been, do you feel you could report that to the Court, the Judge?
> A. I wouldn't serve on it if I couldn't drop my opinion; I wouldn't go with a thought either way.

(Tr. 1235-37).

The voir dire of juror Jones was the most extensive. (Tr. 1146-65). His responses made it clear that he did not want to serve on the jury. (Tr. 1150, 1161). Jones, who exhibited more knowledge about the case than any other juror, stated that he had formed an opinion as to Swindler's guilt after the first conviction. Although Jones's initial responses were at times contradictory, extensive questioning by defense counsel clarified his position. (Tr. 1147, 1155-56). After numerous questions concerning his tentative opinion, Jones stated: "[I]f I was put on that jury I would listen to what was said, and base my opinion on that, period." (Tr. 1158). And, again, he reiterated his impartiality, stating: "I am trying to make it clear to you, which I think is unnecessary, that I would take the evidence and the law in the case and base my opinion on that." (Tr. 1158).

It was for the trial judge to assess Jones's demeanor and attitude. See Yount, 467 U.S. at 1038-1040. Granting the appropriate deference to the trial court's determination of

impartiality, we agree with the District Court that the trial court's decision not to excuse Jones for cause is fairly supported by the record.

IV.

Swindler next contends that he was denied a fair trial when the trial court refused to grant a continuance at the penalty phase of his trial to enable him to offer the testimony of an expert regarding the effects of electrocution on the human body. Swindler intended this evidence to show that death by electrocution is cruel and unusual punishment and for the jury to consider this evidence as a mitigating factor. We find no merit in this claim.

A trial court enjoys broad discretion in ruling on a motion for a continuance. See, e.g., Morris v. Slappy, 461 U.S. 1, 11 (1983); Loggins v. Frey, 786 F.2d 364, 366-67 (8th Cir. 1986), cert. denied, 479 U.S. 842 (1986). "[O]nly an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay'" rises to the level of a constitutional violation. Morris, 461 U.S. at 11-12 (quoting Ungar v. Sarafite, 376 U.S. 575, 589 (1964)).

Here, the trial court's refusal to grant the continuance was clearly not unreasonable because Swindler did not have a justifiable reason for the requested delay. As the trial court ruled, the testimony for which Swindler wanted the delay was irrelevant as mitigating evidence; whether death by electrocution constitutes cruel and unusual punishment is a question of law, and is not within the province of the jury to decide. It follows that the trial court did not abuse its discretion in denying Swindler's request for a continuance.

V.

Swindler next argues that the trial court committed constitutional error by instructing the jury that it could consider as an aggravating circumstance whether the defendant had knowingly created a great risk of death to a person other than the victim. See Ark. Code Ann. § 5-4-604(4) (1987). Swindler objected to this instruction on the ground that there was not any evidence to support the giving of the instruction. This claim is meritless.

Under Arkansas law, a trial court must submit to the jury a mitigating or aggravating circumstance if there is any evidence, however slight, of the circumstance. Miller v. State, 269 Ark. 341, 354, 605 S.W.2d 430, 438 (1980). The record contains substantial evidence that Swindler knowingly created a great risk of death to a person other than the victim. As the Supreme Court of Arkansas found:

> [S]hots were fired in the direction of the station-store front. The evidence is that the officer was struck twice and that Swindler fired twice, but that does not mean that Swindler had any regard for other people in the vicinity. According to the evidence there were at least three people other than the officer in the vicinity; Tinder, Cardwell and Mrs. Cardwell. Swindler could not even swear that he only shot twice; he could not swear that he knew he shot a policeman until after it was done. Tinder was standing behind the counter inside a store front that was virtually all glass. The fact that there may have been a few gasoline pumps or stanchions between Swindler and the store front begs the question. . . . There was ample evidence Swindler had no regard for the lives of others in the vicinity.

Swindler, 267 Ark. at 434, 592 S.W.2d at 99.

We conclude that the trial court's submission of the challenged instruction is sufficiently supported by the record.

VI.

Finally, Swindler contends that he was denied effective assistance of counsel at trial. This claim must be evaluated against the two-prong test announced in Strickland v. Washington, 466 U.S. 668 (1984). First, Swindler must show that "counsel's representation fell below an objective standard of reasonableness," id. at 688, creating "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Second, Swindler must show that the deficient performance prejudiced the defense. Id. In Strickland, the Court explained: "Judicial scrutiny of counsel's performance must be highly deferential . . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." Id. at 689. Swindler's claims of ineffective assistance of counsel are analyzed separately below.

A.

Swindler argues that his counsel[8] rendered ineffective assistance because they failed to follow statutory procedures when moving for a change of venue. Arkansas requires that a motion for a change of venue be accompanied by affidavits or sworn testimony. See Ark. Code Ann. § 16-88-204 (1987). Swindler's trial counsel waited until the voir dire to move for a

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[8]Swindler was represented at his second trial by Don Langston, now a state circuit-chancery judge in Sebastian and Crawford Counties. Judge Langston also represented Swindler at his first trial and won the reversal of that conviction in the Arkansas Supreme Court. Langston had been an attorney for over seventeen years (seven with the public defender's office) at the time of the second trial. Langston was assisted in his representation of Swindler by John W. Settle, now a municipal judge in Fort Smith, Arkansas.

change of venue. None of the six motions for change of venue was supported by affidavits.

Swindler's trial counsel explained at the habeas hearing that the reason he did not file a pretrial change of venue motion accompanied by affidavits was because he felt he could better show that pretrial publicity had prejudiced Swindler's right to a fair trial through the responses of the veniremen at voir dire.[9] (H.Tr. 11-13, 21-22). As observed earlier in this opinion, a great deal of the voir dire concerned the venire panel's exposure to pretrial publicity and whether the publicity had prejudiced them. Further, counsel moved at the close of each day of voir dire for a change of venue on the ground that the questioning of the prospective jurors had established that Swindler could not receive a fair trial. A number of exhibits were offered in support of the final motion.[10] (Tr. 1527-55) Even though the motions were not supported by affidavits, the trial judge considered each motion on the merits. We agree with the District Court that the failure of counsel to follow statutory procedures in moving for a change of venue was not sufficiently serious to amount to a constitutionally deficient performance. 693 F. Supp. at 768. Moreover, it is apparent that Swindler suffered no prejudice from the failure of counsel to follow the letter of the statute.

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[9]Counsel testified at the habeas hearing that his approach in the case was:

> that you could show through voir dire that there was pretrial--that there was prejudice against Mr. Swindler; therefore, you would go on the United States Constitution of due process, denial of a fair trial and things of that nature.

(H.Tr. 21).

[10]These exhibits included information concerning the population of Scott County, the number of registered voters, and a jury list with notations indicating reasons for exclusion. (Tr. 1527-55).

B.

Swindler claims that his counsel rendered ineffective assistance in failing to investigate and offer mitigating evidence regarding his mental problems at the penalty phase of the trial.

Counsel testified at the habeas hearing that he had read a report prepared before the first trial on Swindler's mental condition.[11] (H.Tr. 14). The report consisted of historical data from outside sources; a medical history; reports on the physical, psychiatric, and neurological examinations conducted; a psychological assessment by the staff psychologist; and a psychiatric history. (Tr. 14). Counsel testified: "I think that my basis [for not introducing the report] was that I read over the reports. And I felt that what was in those reports was more damaging than was helpful." (H.Tr. 15). When asked the contents of the report, counsel testified: "Well, it was of course, unfavorable to [Swindler], but--well, we--what we were afraid to do was offer part of it because then the prosecutor, I'm sure, would want to offer all of it, and there was some damaging comments either from Mr. Swindler or something else in those reports that we felt would not be helpful to us." (H.Tr. 74). Counsel did not consider the report to be mitigating evidence. (H.Tr. 74).

As the Court stated in Strickland, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the

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[11]Swindler was ordered to undergo examinations at the Arkansas State Hospital in Little Rock prior to his first trial in order to determine his mental condition. Swindler spent thirty-six days at the state hospital. (Tr. 8-9).

defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). Swindler makes conclusory allegations that counsel should have introduced the report and other evidence of his mental problems. There is nothing, however, in the record of the habeas hearing, other than Swindler's testimony, to show that Swindler in fact suffered from any mental problems. Cf. Burger v. Kemp, 483 U.S. 776 (1987) (petitioner presented affidavits at the habeas hearing that described the evidence that defense counsel might have presented); Wilson v. Butler, 813 F.2d 664 (5th Cir. 1987) (petitioner attached a psychiatric report to his habeas petition that supported his contention of mental defect).

On the other hand, counsel testified that he obtained the state hospital report and determined that it would be more harmful than helpful to Swindler's penalty phase defense. (H.Tr. 15). Swindler has made no showing that the decision of counsel to forego use of the report was inadequate or unreasonable. Therefore, given the strong presumption of competence afforded trial counsel's performance, we cannot find that the tactical decision not to introduce the medical report constituted deficient assistance of counsel. See Hayes v. Lockhart, 852 F.2d 339, 351-52 (8th Cir. 1988), cert. granted, vacated on other grounds, 109 S. Ct. 3181 (1989) (held that counsel's strategic decision not to introduce psychological evidence about defendant because the risk of probable harm exceeded the possible benefit was reasonable). As we stated in Laws v. Armontrout, 863 F.2d 1377 (8th Cir. 1988), cert. denied, 109 S. Ct. 3179 (1989):

> If counsel has through neglect failed to discover [mitigating] evidence, then counsel will be found ineffective. If, however, counsel did not produce the mitigating evidence because, after a reasonable investigation and exercise of professional judgment, he

> has determined that withholding such evidence is the more strategically sound course, then there has been no ineffectiveness.

Id. at 1385. From the evidence presented, we conclude that the investigation by counsel of Swindler's mental problems was reasonable and that the decision not to introduce the state hospital report has not been shown to be constitutionally deficient.

C.

Finally, Swindler argues that counsel erred in failing to request the trial court to admonish the jury not to discuss or read about the case. A review of the record, however, shows that the trial court admonished the potential jurors on the first day of their voir dire as follows:

> All right, now to you jurors whose names were not read, you will be excused until 9:30 tomorrow morning. And again, it is important that you do know that you cannot remain in the courtroom during examination of individual jurors. I would say this to you, also. None of you have been selected on the jury, but all of you are on the jury panel. So certainly do not permit anyone, under [any] possible circumstances, to discuss this case in your presence. Certainly you should not discuss it with any other member of the jury panel.

(Tr. 684-85). Although a further admonition of the jury may have been desirable, we agree with the District Court that the failure to request an additional admonition does not rise to the level of constitutionally ineffective assistance of counsel. 693 F. Supp. at 669-770.

VII.

Swindler has not shown any constitutional flaw in his conviction or sentence. The judgment of the District Court denying Swindler's petition for a writ of habeas corpus is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

12

FILED

NOV 06 1989

ROBERT D. ST. VRAIN
CLERK

No. 88-2387EA

John Edward Swindler,

Appellant,

vs.

A.L. Lockhart, Commissioner of the Arkansas Department of Correction,

Appellee.

Order Denying Petition For Rehearing and Suggestion For Rehearing En Banc

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

November 6, 1989

Order entered at the Direction of the Court:

Robert D. St. Vrain

Clerk, U. S. Court of Appeals, Eighth Circuit.

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

AUG 12 1988

CARL R. BRENTS, CLERK
By: DEP. CLERK

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

JOHN EDWARD SWINDLER **PLAINTIFF**

V. **NO. PB-C-81-415**

A. L. LOCKHART, Director,
Arkansas Department of Correction **RESPONDENT**

MEMORANDUM OPINION

Petitioner John Edward Swindler was convicted of the capital felony murder of Randy Basnett, a Ft. Smith police officer, and was sentenced to death by the Circuit Court of Sebastian County, Arkansas. The Supreme Court of Arkansas set aside that conviction and granted Swindler a new trial because the trial court had erroneously refused to grant the defense motion for a change of venue from Sebastian County, the situs of Officer Basnett's killing. Swindler v. State, 264 Ark. 107, 569 S.W.2d 120 (1978).

Swindler was retried in Scott County, Arkansas, which adjoins Sebastian County to the South. The Circuit Court of Scott County found Swindler guilty of capital felony murder and sentenced him to death. This second conviction and death sentence have been appealed and affirmed by the Supreme Court of Arkansas, 287 Ark. 418, 592 S.W.2d 91 (1979), cert. denied, Swindler v. Arkansas, 449 U.S. 1057 (1980). Subsequently, Swindler filed for post-conviction relief pursuant to Rule 37 of

the Arkansas Rules of Criminal Procedure. The petition was denied by the Supreme Court of Arkansas, Swindler v. State, 272 Ark. 340, 617 S.W.2d 1 (1981), cert. denied, 454 U.S. 933 (1981). Thus, post-conviction remedies available through the courts of the State of Arkansas have been exhausted.

Petitioner seeks relief from the Scott County conviction and death sentence and has filed for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2242 and 2254. He asserts six (6) grounds for relief[1]: (1) a venireman was excluded after he voiced only general objections to the death penalty; (2) Ark.Stat.Ann. § 43-1507[2] was unconstitutionally applied to him when he was denied a second change of venue; (3) jurors biased against the petitioner were selected after the defense had exhausted its peremptory challenges; (4) the trial court erred in refusing to grant a continuance in the penalty phase of his bifurcated trial so that the defense could present a witness to testify in his behalf; (5) Ark. Stat.Ann. § 41-1303(4)[3] was unconstitutionally applied to petitioner when an impermissible "aggravating circumstance" was considered by the jury in the penalty phase of

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[1]Petitioner originally asserted nine (9) grounds for relief, but proceeded with only seven at the habeas hearing. He now concedes that the claim that the "death qualifying" of the jury violated his sixth amendment right must fail in light of Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758 (1986).

[2]The Arkansas venue statute is now found at Ark. Code Ann. § 16-88-207.

[3]The statute is currently found at Ark. Code Ann. § 5-4-604(4).

his trial; and (6) petitioner was denied effective assistance of counsel at trial.

I.

Four veniremen were excused after voicing objection to the death penalty. The petitioner challenges the exclusion of one of the four, Murl Carmak, on grounds that Carmack expressed only general objections to the death penalty.

Exclusion of a juror on the basis of objection to the death penalty is appropriate when that juror's views "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

The trial court excused Mr. Carmack after a series of questions posed to Mr. Carmack by counsel and the court revealed opposition to the death penalty. Several of those questions indicate that Mr. Carmack was properly excused for cause:

> Q. I understand you might not want to [impose the death penalty], but you know it is the law of Arkansas, and if you listened to the evidence and you found that under our law this was a proper case for the death penalty, then could you follow Arkansas law, or would you stick to your own personal feelings?
>
> A. Well, now I would stick to what I believe in.
>
> Q. So are you telling me that no matter what the facts are, or what the law is, that you would not vote for the death penalty?
>
> A. No, I don't think I would.

Q. Okay, now you say you don't think you would. Can you tell me for sure that you would or would not?

A. Well, I wouldn't then, I will put it that way.

Q. No matter what the facts were, or what the law was, you would not vote for the death penalty?

A. No, I don't believe I could, and then have a clear conscience.

. . . .

THE COURT: Now what he has asked you is, and I want to ask you, too, to be sure that I understand. Is that feeling that you have or your belief so fixed and strong that regardless of what the facts might be, regardless of how bad they might be, or how aggravating they might be, in any case, that under no circumstances could you consider imposing the death penalty?

A. I wouldn't.

THE COURT: In any case?

A. I don't believe I would.

(Tr. 1447-48).

This court is obligated to presume the correctness of the trial court's findings of fact. 28 U.S.C. § 2254(d). The United States Supreme Court has held that the trial court's decision to excuse prospective jurors due to their opposition to the death penalty is primarily a factual determination, thus subject to a presumption of correctness under § 2254(d). Wainwright v. Witt, supra. The trial court is best suited to judge the issue of bias since "such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." Id. at 428.

In this case the trial court's findings must be sustained. Venireman Carmack plainly said that under no circumstances would

he vote to impose the death penalty. Mr. Carmack was properly excused.

II.

The petitioner next argues that his sixth amendment right to be tried by an impartial jury was abridged when the trial court denied a motion for a change of venue. After Swindler's first conviction, the Supreme Court of Arkansas reversed and granted a new trial because the trial judge had refused to grant the defense motion for a change of venue from Sebastian County, where Swindler had shot and killed a Ft. Smith police officer. Swindler, supra. On remand, the trial was conducted in Scott County, which is adjacent to Sebastian County.

Swindler contends that he was entitled to a change of venue in the second trial because prejudicial pre-trial publicity in Scott County was indistinguishable from that in Sebastian County. Swindler further contends that he was denied a change of venue from Scott County because of an unconstitutional Arkansas statute[4] which purports to limit a criminal defendant to one change of venue. The argument is without merit and is unsupported by the record.

The question of whether to grant a change of venue rests squarely in the discretion of the trial court. Johnson v. Nix,

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[4]Ark. Code Ann. § 16-88-207.

763 F.2d 344 (8th Cir. 1985). The trial judge had the opportunity to evaluate the tenor of the voir dire and to observe and assess each prospective juror's demeanor in conjunction with his or her answers to questions. Thus, the trial judge was uniquely qualified to determine whether a change of venue was required in order to assure that the defendant received a fair trial. It is settled law that the trial court's findings of impartiality can be overturned only for "manifest error." Patton v. Yount, 467 U.S. 1025 (1984), quoting Irvin v. Dowd, 366 U.S. at 723. In other words, this court must accord the state court findings of fact a "high measure of deference," Sumner v. Mata, 455 U.S. 591 (1982), and may not set them aside unless it is reasonable to conclude that those findings "lacked even 'fair support' in the record." Johnson, 763 F.2d 344 at 345, quoting Marshall v. Lonberger, 459 U.S. 422 (1983).

The question of prejudicial pre-trial publicity requires a two-prong inquiry: First, what was the nature and extent of the pre-trial publicity; and second, what was the effect of the pre-trial publicity on the venire panel from which the jury was selected, and on the jury itself. See Simmons v. Lockhart, 814 F.2d 504 (8th Cir. 1987). Widespread or even adverse publicity is not, in and of itself, grounds for a venue change. Johnson, supra. This court must determine from the totality of the circumstances, whether the trial court committed manifest error in failing to hold that adverse pre-trial publicity had created such a presumption of prejudice in the community that jurors'

claims that they can be impartial should be disbelieved. Yount, supra.

The only evidence of the extent of pre-trial publicity in this case is the transcript of the voir dire of the prospective jurors. In a voir dire that lasted five days, 120 veniremen were examined; 79 were excused for cause.

It is clearly established law that the number of jurors excused for cause, standing alone, does not entitle a defendant to a change of venue. See Yount, supra. There is no "magic number" excused for cause that triggers the presumption that there exists within the community a "pattern of deep and bitter prejudice" against the defendant so evident that the entire panel must be presumed to have been "irretrievably poisoned by the publicity." Simmons, supra, 814 F.2d at 511, quoting Irvin v. Dowd, 366 U.S. 717 (1961).[5] The Supreme Court carefully distinguished between knowledge of and feelings about the case: "It is not unusual that one's recollection of the fact that a notorious crime was committed lingers long after the feelings of revulsion that create prejudice have passed." Yount, 467 U.S. at 1035.

Of the 79 veniremen excused for cause in the pending case,

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[5]However, it is instructive to note that in Yount, 163 veniremen were questioned, all but two of whom had some knowledge of the case. Seventy-seven percent of those questioned admitted they would carry an opinion into the jury box. Eight of the fourteen actually seated as jurors or alternates admitted that at some time they had formed an opinion as to the defendant's guilt.

many were excused because of an inability to accept philisophically the legal concepts of "presumption of innocence" and "burden of proof." See, e.g. the statements of the following: Venireman #4, May (no evidence of exposure to pre-trial publicity, but did not answer that defendant, prior to trial, is innocent) (TR 725); Veniremen #14, Stinson, and #1, Owen, (had no fixed opinion as to guilt but excused because they would require defendant to offer evidence) (TR 825, 723).

Others felt their opinions of guilt were fixed since they had knowledge that the first trial had resulted in a conviction. See, e.g., statements of the following veniremen: Venireman #9, Campbell (cannot presume defendant innocent because he has "already been tried") (TR 750); Venireman #12, Nelson (knew very little of background of the case, but excused because he would require defendant to produce some evidence since he had already been convicted in one fair trial) (TR. 769); Venireman #13, Neal (very little exposure to pre-trial publicity, but excused because he cannot "conceivably think that twelve people would convict him unless he was guilty") (TR 809-10). Still others felt that since Swindler had been convicted once, that conviction should stand and he should not be entitled to a second trial. See, e.g., the following statements. Venireman #34, Snellgrove (excused because of belief that Swindler's first trial was fair) (TR 988); Venireman #45, Nichols (excused because defendant had "already been proved guilty" and should not have another trial) (TR 1055). While these legal misunderstandings

may require excusal for cause, they do not necessarily evince a wave of public passion against this particular defendant.

In this case, the trial court advised counsel that all doubts or questions about the impartiality of any prospective juror would be resolved by excusing that person. (T. 1559). A review of the voir dire indicates that the trial court did exactly that. The trial judge is to be commended for his cautious approach, particularly when, as in this case, the defendant faces the possibility of a death sentence.

It is reasonable to expect the number of prospective jurors excused for cause to be high in a sensational case such as this. There was unquestionably a great deal of publicity. Furthermore, there is an understandable reluctance on the part of many to serve on a jury where the imposition of the death penalty lurks as a possibility, as evidenced by the voir dire of Cora Owens:

> Q. No one then has ever expressed any opinion about what they felt about the case?
>
> A. Well, except for my ex last night, he just said that he was trying to tell me how to get off [the jury] if I wanted off.

(T. 1422).

A review of the voir dire of prospective jurors does reveal that a large number of those questioned had at least some knowledge of the case. But clearly, mere knowledge or remembrance of the facts surrounding the case is not the same as a deep and bitter prejudice fueled by "so huge a wave of public passion" against the defendant that even those who profess to hold no opinion must be deemed tainted. Irvin, supra. The

United States Supreme Court has held that there is no requirement that jurors be totally ignorant of the facts and issues involved.

> In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases.

Irvin, 366 U.S. at 722-23.

Two other factors lend support to the trial court's finding that an impartial jury could be empaneled in Scott County. First, by the time the second trial convened, over two years had elapsed since Officer Bassett's killing. In the case of Simmons v. Lockhart, the defendant's trial began only seven months after the murders of three victims. The Court of Appeals for the Eighth Circuit affirmed the trial court's refusal to move the trial from the county in which the victims were abducted and noted: "Seven months is not long enough to allow complete forgetfulness of such a major event as this, but it may be long enough to allow the initial heat and hostility to dissipate, particularly when the local press had not kept the story in the forefront of public attention." Simmons, 814 F.2d at 510. The two-year interim in Swindler's case suggests that the nature and extent of the publicity must surely have diminished along with the heat and hostility. In fact the voir dire suggests that exposure of many veniremen to publicity surrounding the case occurred immediately after the shooting occurred, or around the time of first trial. See, e.g., statements of the following: Venireman 053, Roderick (heard news accounts about his first

trial.") (TR 1104); Venireman 057, Ryne (only knowledge came from newspaper accounts "at the time") (TR 1137); Venireman 071, Williams ("Well I did read the newspaper during the other trial.") (TR 1201).

Second, the fact of the matter is that the defendant was not tried in the community, or county where the crime were committed. As juror Owens noted in voir dire: "I have heard a little bit about the case, but I didn't pay too much attention to it because it wasn't right here in town [Waldron, Scott County]." (T. 1421). Cases such as Patton v. Yount, supra, and Simmons v. Lockhart, supra, by which this court is bound, have upheld the trial court's refusal to move the trial from the situs of the crime. This court finds no manifest error in the trial court's determination that the defendant could receive a fair trial in this changed venue in a different county and different judicial district.

The Arkansas statute in question, which purports to limit a criminal defendant to one change of venue, is not unconstitutional on its face. As with Article 2, § 10 of the Constitution of Arkansas,[6] the statute can, and must, be read as operative only within the bounds of the sixth and fourteenth amendments to the United States Constitution.

In this case, the trial court apparently had some

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[6]The constitutional provisions limit venue in criminal cases to a county in the judicial district in which the indictment was brought.

misapprehension about its power to grant a second change of venue. However, even if the trial judge erroneously believed that Ark. Code Ann. § 16-88-207 prevented absolutely a second change of venue, the court expressed a willingness to consider the constitutional implications of the statute if necessary to preserve the defendant's right to a fair trial." (TR 879).

As in the case of Simmons, supra, the trial court gave alternative reasoning for denying the change of venue and did not base his decision solely on the belief that he lacked the authority to grant the change. Even if there were error, there was no actual prejudice since the seated jury was composed of those who either had virtually no knowledge of the case, or who had tentative opinions which could be set aside.

Accordingly, this court having found no manifest error in the decision of the trial court not to permit a change of venue from Scott County, this ground for relief is DENIED.

III.

For his next point the petitioner alleges that three jurors were seated who should have been excused for cause. The strong presumption of correctness of the trial court's findings, discussed infra, is equally applicable to findings of impartiality of individual jurors:

> There are good reasons to apply the statutory presumption of correctness to the trial court's resolution of these questions [of impartiality of jurors]. First, the determination has been made only

> after an often extended voir dire proceeding designed specifically to identify biased veniremen. . . . Second, the determination is essentially one of credibility, and therefore largely one of demeanor. As we have said on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal, to "special deference." E.g., Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 500 (1984). The respect paid such findings in a habeas proceeding certainly should be no less.

Yount, 467 U.S. at 1038.

Neither the fact that the three jurors in question had knowledge of the case, nor the fact that they held tentative opinions as to the defendant's guilt rendered them ineligible to serve, so long as they could set aside any opinion they might have had and so long as they could assure the court that their verdict would be based solely on the evidence presented at trial.

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin, 366 U.S. at 722-23. The court has reviewed the voir dire of each of the three jurors and finds no manifest error in the trial court's finding that each could set aside any preconceived notions.

Accordingly, this ground for relief is DENIED.

IV.

The petitioner next alleges that he was denied a fair trial

at the penalty phase of his trial when the trial court denied a request for a one-day continuance so that he could offer the testimony of Mr. Don Reid. Mr. Reid would have testified that death by electrocution constitutes cruel and unusual punishment. The testimony would have centered on the effects of electrocution on the human body. Petitioner urges that he was entitled to present this testimony as mitigating evidence, so the jury could decide whether electrocution was an appropriate punishment for his crime.

The trial court refused to grant the continuance because it considered testimony about the effects of electrocution on the human body to be inadmissible as mitigating evidence. The judge opined that a determination as to whether electrocution constituted cruel and unusual punishment was a question of law, not of fact, thus was outside the province of the jury.

The petitioner's argument has now been mooted by the fact that the General Assembly of the State of Arkansas has changed the method of execution from electrocution to lethal injection.[7] The change would permit the petitioner now to elect either of these methods by which to die. Even if there were error in the exclusion of the testimony, the petitioner has suffered no actual harm in the jury's not being apprised of the pain and suffering incurred during an electrocution. The petitioner need not choose that method of execution.

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[7]Ark. Code Ann. § 5-4-617.

Regardless, the trial court's ruling on the matter was not erroneous. The defendant in a death case is granted wide latitude in presenting mitigating evidence in the penalty phase of the trial. But even Yankee stadium has a fence around it. The trial court is not precluded from excluding "evidence" which is irrelevant to the defendant's character, prior record, or the circumstances of the offense. Lockett v. Ohio, 438 U.S. 586 (1978).

The jury has no duty to determine the method of execution, any more than it has a duty to determine the specific penitentiary in which a defendant should be incarcerated. The pain associated with electrocution is no more relevant to the penalty phase of a murder trial than would be the horror stories of atrocities that go on within our penitentiaries. The petitioner was not entitled to have the testimony presented. The denial of the motion for continuance was proper since the testimony to be offered was correctly deemed inadmissible.

Accordingly, this ground for relief is DENIED.

V.

The petitioner alleges that Ark. Code Ann. § 5-4-604, which governs what constitutes an "aggravating circumstance" for purposes of supporting the imposition of the death penalty, was unconstitutionally applied to him. At the penalty phase of the trial, the court instructed the jury that it could consider as an

aggravating circumstance whether the defendant had knowingly created a great risk of death to a person other than the victim. The trial court gave the instruction over the defense objection that there was insufficient evidence in the record to support the giving of the instruction. This ground is patently meritless.

The facts recited by the Supreme Court of Arkansas indicate ample evidence that the petitioner knowingly created a great risk of death to a person other than the victim:

> The shots were fired in the direction of the station-store front. The evidence is that the officer was struck twice and that Swindler fired twice, but that does not mean that Swindler had any regard for other people in the vicinity. According to the evidence there were at least three people other than the officer in the vicinity; Tinder, Cardwell and Mrs. Cardwell. Swindler could not even swear that he only shot twice; he could not swear that he knew he shot a policeman until after it was done. Tinder was standing behind the counter inside a store front that was virtually all glass. The fact that there may have been a few gasoline pumps or stanchions between Swindler and the store front begs the question. . . . There was ample evidence Swindler had no regard for the lives of others in the vicinity. Such evidence was in Tinder's testimony, Cardwell's testimony, and all those loaded guns, and even Swindler's own testimony."

267 Ark. at 434, 599 S.W.2d at 99.

These findings are entitled to a presumption of correctness, just as are those of the trial court. Sumner v. Mata, supra. Swindler's own testimony in the case confirms that he went into the store to ask for directions, saw Tinder and Officer Basnett talking, and went back outside. (T. 2006). Swindler even mentions that, once outside, he saw a couple of children on bicycles. (T. 2008). Clearly, there was ample evidence in the

record to support giving the instruction.

Accordingly, this ground for relief is DENIED.

VI.

Petitioner next asserts that he was denied the effective assistance of counsel at trial. In the case of Strickland v. Washington, 466 U.S. 668 (1984), the Court established two requirements for finding ineffective assistnce of counsel. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." Id. at 687.

The court further explained:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." . . . There are countless ways to provide effective assistance in any

deficient. However, in this case, the trial judge considered each motion on the merits, ignoring the absence of supporting documentation. It is unnecessary for this court to speculate why the affidavits were not offered simultaneously with the motions, or why the trial court considered the motions as properly submitted and ripe for decision. The record shows that a number of exhibits not explicitly required by statute were offered in support of the last motion. (TR 1527). In any event, the motions were all decided on the merits, as if they had been properly submitted. Thus this court does not find that the counsel's failure was an error so serious as to amount to constitutionally deficient performance.

Even if counsel's failure to file the documents were deemed deficient, petitioner's claim could not succeed, since there is no showing thata he was prejudiced. Having held that it was not error to deny the second change of venue, the court can find no prejudice in counsel's failure to file supporting documents with the motion for change of venue.

B.

Petitioner also alleges that his counsel rendered constitutionally ineffective representation by failing to investigate and offer mitigating evidence regarding his mental problems at the penalty phase of the trial.

The petitioner's trial counsel testified at the habeas

hearing that the petitioner was sent for a mental examination before his first trial. H.T. 14. Counsel testified that he had investigated the defendant's mental condition by way of securing records from the state hospital, where the mental evaluation was performed. Counsel testified as follows:

> Q. Do you recall ever have [sic] conversations with the psychiatrist or psychologist [at the state hospital] who examined John Swindler?
>
> A. I don't have any independent recollection of it now.
>
> Q. In any event, none of those officials or persons were called in support of any mitigating circumstances, were they, in either the first or the second trial?
>
> A. I think that my basis on that was that I read over the reports. And I felt that what was in those reports was more damaging than was helpful.

H.T. 15. Counsel further testified:

> A. We never -- I don't think we even though about introducing the State Hospital stuff at the second trial. The decision, I think, was made at the first trial not to introduce that, and we never changed that decision.
>
> Q. Do you recall what the gist of the State Hospital -- the result of their evaluation was?
>
> A. Well, it was, of course, unfavorable to him, but -- well, we -- what we were afraid to do was offer part of it because then the prosecutor, I'm sure, would want to offer all of it, and there was some damaging comments either from Mr. Swindler or something else in those reports that we felt would not be helpful to us.
>
> Q. So it's fair to say then you didn't think that that would be mitigating evidence?
>
> A. That's correct.

H.T. 74.

There is absolutely nothing in the record of the habeas hearing to establish that the petitioner indeed suffered any

mental disturbance which could have been introduced at his trial, except the petitioner's testimony. Cf. Wilson v. Butler, 813 F.2d 664 (5th Cir.1987) (petitioner attached a psychiatric report to his habeas petition that supported his contention of mental defect). There was evidence that the reports from the State Hospital would have contained information about personality defects, had they been present, as well as a complete background of the patient's mental history.

In sum, from the evidence presented, the court cannot conclude that trial counsel's investigation was inadequate or unreasonable. The decision not to introduce psychciatric records was a strategic decision based on the fact that it contained more damaging than helpful information. Given the strong presumption of competence, this court cannot find that counsel's performance was constitutionally deficient.

C.

Petitioner's last allegation regarding ineffective assistance of counsel is that trial counsel failed to request an admonition to the panel of veniremen not to discuss or read about the case. The trial transcript indicates that the trial court did indeed admonish the veniremen: "All right, now to you jurors whose names were not read, you will be excused until 9:30 tomorrow morning. And again, it is important that you do know that you cannot remain in the courtroom during examination of the

individual jurors. I would say this to you, also. None of you have been selected on the jury, but all of you are on the jury panel. So certainly do not permit anyone, under [any] possible circumstances, to discuss this case in your presence. Certainly you should not discuss it with any other member of the jury panel." (TR 684-85). Counsel's failure to request different or further admonition does not rise to the level of constitutional ineffective assistance of counsel.

Petitioner further contends that his trial counsel erred in failing to object to the admission of a record of an armed robbery during the penalty phase of the trial which did not indicate that he was represented by counsel. The court has reviewed the record of that conviction even though the issue is arguably not properly before the court due to procedural default. The record which was introduced rather clearly indicates that the State of South Carolina was represented by John W. Foard, Jr. (TR. 2187-88). The allegation is soundly rebutted by the record of the trial.

In light of the record, this court cannot conclude that the representation the petitioner received was outside the range of reasonable professional assistance. This ground for relief is DENIED.

CONCLUSION

It is the considered opinion and judgment of this court that the petitioner, John Edward Swindler, was afforded a fair and constitutional trial before the Circuit Court of Scott County, Arkansas. Accordingly, the petition for writ of habeas corpus is hereby denied.

This 12 day of August, 1988.

HENRY WOODS, U. S. District Judge

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 88-2387EA

John Edward Swindler, Appellant,	*	Appeal from the United States District Court for the Eastern District of Arkansas
v.	*	
A. L. Lockhart, etc., Appellee.	*	

Appellant's motion to recall the mandate and reinstate stay pending filing of a petition for writ of certiorari in the United States Supreme Court is granted to and including January 26, 1990. The Clerk of the United States District Court for the Eastern District of Arkansas is directed to return the previously issued mandate to this Court. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

December 19, 1989

Order Entered at the Direction of the Court:
Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.